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Supreme Court, U.S.
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No. 04-1626

In the Supreme Court of the United States

MARCUS A. NOBLE,

Petitioner,

v.

BRINKER INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Brinker International, Inc. is a publicly owned corporation, which operates the following restaurant concepts: Chili's Grill & Bar, Romano's Macaroni Grill, Corner Bakery Café, On the Border Mexican Grill & Cantina, and Maggiano's Little Italy.

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STATEMENT OF THE CASE

Petitioner Marcus Noble ("Noble") filed his Complaint in the United States District Court for the Southern District of Ohio, Eastern Division, on June 15, 2000, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Ohio Revised Code §§4112.02 and 4112.99. Noble also asserted an Ohio common law claim of wrongful termination in violation of public policy. His claims stemmed from his allegedly discriminatory termination from employment with Respondent Brinker International, Inc. ("Brinker").

Brinker filed its Motion for Summary Judgment on all of Noble's claims on July 27, 2001. Noble responded on September 12, 2001. On December 12, 2001, the district court granted summary judgment to Brinker on the Ohio wrongful termination claim but denied it as to the federal and state race discrimination claims.[1]

The case proceeded to trial on December 17, 2001, at which Brinker moved for judgment as a matter of law at the close of Noble's evidence and again at the close of all the evidence. The district court denied both of these motions. The jury was unable to reach a unanimous verdict and the district court dismissed the jury on December 26, 2001.

A second trial was held on January 9, 2002. Prior to the trial, on January 4, 2002, Brinker filed a motion for judgment

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[1] In its opinion, the district court held that the only adverse employment action to which Noble had been subjected was his termination.

as a matter of law, which the trial court denied on January 9, 2002. At the second trial, Brinker moved again for judgment as a matter of law at the close of Noble's case in chief and again at the close of all the evidence. The district court denied both of these motions. On January 16, 2002, the jury returned a verdict in favor of Noble in the amount of $25,000 in compensatory damages, and $225,125 in punitive damages. Brinker filed a motion for judgment as a matter of law, or in the alternative, for a new trial, which the trial court denied on September 18, 2002.

Brinker timely appealed to the Sixth Circuit Court of Appeals. After full briefing and oral argument, the Sixth Circuit reversed the denial of Brinker's motion for judgment as a matter of law. It held that Noble had not fulfilled his burden in proving intentional discrimination and therefore, Brinker was entitled to judgment as a matter of law on all of the remaining claims.

Noble now seeks a writ of *certiorari* from this Court.

STATEMENT OF THE FACTS

Noble has misconstrued or misrepresented significant portions of his factual recitation to this Court. Brinker puts forth the following statement of facts and in so doing, objects to the factual recitation of Noble in its entirety.

Brinker operates several concept restaurants throughout the United States, including Romano's Macaroni Grill. One of its restaurants was located in Worthington, Ohio, and this was the location that hired Noble as a server in June 1998. Each Macaroni Grill is staffed with a number of assistant managers and a general manager who has primary responsibility for restaurant operations, including issues

related to personnel. The general manager reports to the area director.

The first general manager under whom Noble worked was Linda Lawrence. Lawrence was assisted by service manager Jeanne Osborne, whose primary responsibility was to oversee Macaroni Grill's servers. Tim Wiseman took over for Osborne in Fall 1998. In January 1999, Lawrence transferred out of the Worthington, Ohio restaurant to another Macaroni Grill restaurant in Maine.

While Lawrence was at the Worthington, Ohio restaurant, Noble accused Lawrence of racially discriminatory actions (all of which the district court found were not adverse employment actions) For instance, all servers were required to undergo a series of training sessions and examinations, including a final oral examination, before being allowed to serve guests. Noble claimed that Lawrence had improperly failed him numerous times. He further testified that Lawrence directed hostesses not to seat guests at his tables, although Lawrence testified that such directive was because Noble was unable to handle a full section and that other servers with the same difficulty were treated the same.

Shortly after commencing employment at the Worthington, Ohio restaurant, it was discovered that Noble had misrepresented on his employment application concurrent work at another Brinker restaurant. The application specifically listed other Brinker-owned restaurants, including Chili's, and asked whether the applicant had worked at any of them. Noble failed to disclose that he was working at Chili's while he was also working at Macaroni Grill, which posed overtime implications for Brinker. This was especially a problem because Noble's payroll information at Chili's existed under a different social security number. When

Lawrence confronted Noble about the misrepresentation on his application, Noble accused her of racism and threatened to sue. Lawrence responded by giving Noble the contact information for the area director, William Richardson (an African-American) and Human Resources Department.

Noble proved to be a disciplinary problem at Macaroni Grill. During his less than one year of employment, he received three disciplinary write-ups for three separate incidents: rushing guests to finish their dining, using profanity in the presence of guests, and failing to responsibly greet guests when they were seated. On each of these write-ups, Noble failed to dispute them, but signed the portion of the write-up form where he acknowledged the problem and agreed to correct it, as well as the consequences for failing to correct it.

After Lawrence's transfer out of the Worthington, Ohio Macaroni Grill to a Macaroni Grill restaurant in Maine, Tony Ficorelli became the general manager of the Worthington, Ohio restaurant. Ficorelli was not aware of Noble's prior discipline or his claims of discrimination. While he and Lawrence met once after Ficorelli assumed the general manager position, they did not discuss Noble. Ficorelli and Noble got along and Noble did not accuse Ficorelli of any discriminatory behavior during his employment. Until his termination, Ficorelli did not discipline Noble, even after a guest accused Noble of making a disparaging comment.[2]

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[2] While Noble denied making the comment at the time Ficorelli discussed it with him, he admitted at trial that he had made that statement.

On April 15 or 16, Ficorelli discovered that he needed a shift covered for Saturday, April 17, 1999. Noble agreed to take the shift, but failed to appear for it or call off. Brinker's policy with respect to absenteeism provides that failure to report for a shift is a terminable offense. Ficorelli directed an assistant manager to terminate Noble's employment. On April 18, 1999, Noble signed the disciplinary write-up, stating he understood the discipline and the potential consequences for failing to correct his behavior, and further acknowledged that he understood he was being terminated for failing to show or call off for the April 17, 1999 shift.

SUMMARY OF THE ARGUMENT

In his Petition, Petitioner Noble asserts that there are three questions for this Court's review: 1) whether it is necessary for this Court to address the level of evidence necessary to establish a causal connection between a decision maker and the person with the racial animus in a discrimination case, 2) that there is a split in the circuits with respect to consideration of evidence comprising a *prima facie* case after a trial on the merits, and 3) whether the Sixth Circuit impermissibly substituted its judgment for that of the jury. In so doing, however, Noble puts forth no valid legal reason as to why any of these issues require review by this Court. Instead, he simply articulates his own opinion that the Sixth Circuit made erroneous factual findings or misapplied a properly stated rule of law, both of which are insufficient considerations for this Court to grant *certiorari*.

In any event, the Sixth Circuit's actions in reviewing Noble's case evidence no error. The Sixth Circuit affirmed the consistently applied "cat's paw" analysis. In keeping with this Court's precedent in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d

105 (2000) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Sixth Circuit affirmed the ability of a reviewing court to consider evidence comprising the *prima facie* case when assessing whether a plaintiff had made the ultimate showing of intentional discrimination. With respect to credibility determinations, it is notable that Noble himself actually seeks this Court to make such credibility determinations, but that the Sixth Circuit made no such impermissible findings.

REASONS FOR DENYING THE WRIT

I. THERE IS NO NEED FOR THIS COURT TO ADDRESS THE LEVEL OF EVIDENCE NECESSARY TO ESTABLISH A CAUSAL CONNECTION BETWEEN THE DECISION MAKER AND THE PERSON WITH RACIAL ANIMUS.

In asserting that this Court should accept review, Noble claims that there is an "express conflict" in the circuits as to the level of evidence needed to establish a causal nexus between the decision maker and the person with racial animus in a discrimination case. Here, he is presumably speaking of his speculation (as he proffered no evidence in either trial) that Lawrence told Ficorelli about him and somehow imputed her supposed racial animus to Ficorelli. Factually, this is a non-issue, as no reasonable fact-finder could have found any exchange of information between Lawrence and Ficorelli, as the two parties to the supposed conversation denied anything of the sort was discussed. Legally, this argument has no merit. The circuits are remarkably consistent in their application of the "cat's paw" doctrine, and even Noble's proffered cases indicate this consistency.

As the Sixth Circuit noted, Noble presented evidence at trial which, when viewing it most favorably to him, tended to show that Lawrence may have harbored racial animosity toward Noble. And while such evidence may have played a part in the jury's award to Noble, it is an absolutely insufficient basis on which to deny judgment as a matter of law to Brinker. First of all, the only adverse employment action on which Noble could recover (as the district court noted and which Noble has not disputed) was his termination, an event which took place without Lawrence's participation or even presence, as she had already transferred to a Macaroni Grill in Maine. Significantly, Noble specifically testified that he had no problem with Ficorelli, the individual who terminated him, and that Ficorelli never displayed any racial animosity toward Noble or others.

Acknowledging this, Noble attempted on appeal to impute the claimed racial animus of Lawrence to Ficorilli, in effect, raising the "cat's paw" argument. Put another way, he sought to show that Lawrence so influenced Ficorelli with respect to Noble's termination that he simply acted as Lawrence's "cat's paw." No such evidence exists, however. The only evidence of any collaboration came from (indeed, the only source from which it could come) the participants in the conversation - Ficorelli and Lawrence themselves, who testified that they never discussed Noble and never worked together at any Macaroni Grill. This was the only testimony on the subject and while Noble speculated that they discussed him, he, of course, had no personal knowledge on the subject. Thus, the Sixth Circuit correctly held that "Noble failed to present evidence that could establish a causal nexus between Lawrence's alleged discriminatory treatment of Noble and Ficorelli's subsequent decision to terminate the plaintiff's employment."

As a result, and in light of the complete absence of evidence of any connection between the two, Noble's urging of this Court to clarify the "cat's paw" doctrine is inappropriate. The Sixth Circuit correctly defined and applied the doctrine, and thus, nothing needs to be clarified.

The case law on this doctrine is surprisingly consistent – that an employer cannot insulate itself from liability if a subordinate or non-decision maker who harbored racially discriminatory attitudes exercised a substantial influence or played a role in the adverse employment action. Put another way, if the one who harbored racially discriminatory attitudes somehow influenced the decision, however removed from or subordinate to the process, an employer cannot simply point to that person's non-involvement as a defense. Indeed, the cases that Noble puts forth in support of his claim that this issue needs review are consistent and it is unclear where such a conflict comes in. The cases he cites appear merely to have factual differences in them. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) ("an aggrieved employee who rests a discrimination claim upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision maker for the employer"); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096 (7th Cir. 2001) (a plaintiff must have a "factual basis in the record for the assertion that the biased individual's prejudice was the motivation for the decision-maker's actions"); *Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (evidence that a biased supervisor who provided information and advice about whether to fire plaintiff was sufficient); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996) (dismissal tainted because decision maker had obtained critical information which factored into

the decision from an allegedly biased company accountant); *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171 (2d Cir. 1992) (could find unlawful discrimination based on evidence of discriminatory motives on the part of a person involved in the decision making process); *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265 (3d Cir. 2001) (evidence that dean and department chair harbored discriminatory views and had played a role in the decision was sufficient to support a jury verdict in favor of the plaintiff); *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003) (evidence of discriminatory remarks sufficient to support jury verdict if made by a person primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decision maker), *cited with approval by Palasota v. Haggar Clothing Co.*, 342 F.3d 568 (5th Cir. 2003); *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002); *Rios v. Rossotti*, 252 F.3d 375 (5th Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998); *Simpson v. Diversitech*, 945 F.2d 156 (6th Cir. 1991) (interim disciplinary actions by low level supervisor with racial animosity without which dismissal would not have occurred were sufficient); *Wilson v. Stroh Cos., Inc.*, 952 F.2d 942 (6th Cir. 1992) (summary judgment appropriate for employer when plaintiff failed to submit evidence that supervisor's racial animus had influenced or affected the decision of two other managers to terminate him); *David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003) (lower level official who discriminatorily provided false or incomplete information to decision maker rendered employer liable); *Willis v. Varion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1997); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394 (7th Cir. 1997) (same); *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993) (same); *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446 (7th Cir. 1994) (when company solicited

views about plaintiff from harassing official, who rendered disparaging information that led to dismissal, summary judgment improper); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994) (discriminatory remarks of manager, who was fired employee's supervisor and who was involved in decision, constitute direct evidence of discrimination); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136 (9th Cir. 2001) (manager's retaliatory motive imputed to employer if he was involved in the decision).

The "cat's paw" standard is clear and consistent among the circuits and there is nothing for this Court to decide. Regardless, however, Noble presented no evidence to allow a reasonable jury to conclude that Lawrence had played any role in his termination. In fact, the only evidence in the case showed emphatically that she had not. Therefore, there was no "cat's paw" analysis that could have or should have been made because there was no evidence of any influence or even input by Lawrence into the decision. At Page 17 of the Petition, Noble calls upon this Court to make a credibility determination, stating that the jury could disbelieve that Lawrence and Ficorelli did not discuss Noble. As he strenuously argues elsewhere in his Petition, however, a trial court adjudicating a motion for judgment as a matter of law cannot consider such credibility determinations. All the court was left with were the bare words of Lawrence and Ficorelli, which, even considered most favorably to Noble, should have compelled judgment for Brinker.

Thus, this is not a case that this Court can or should accept *certiorari* to determine this point of law. The circuits have developed the law and the evidentiary standard. They are applying it remarkably consistently.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *REEVES* AND *HICKS* WITH RESPECT TO CONSIDERATION OF EVIDENCE COMPRISING A *PRIMA FACIE* CASE.

It is unclear what Noble means as to a "split among the circuits" as to whether a court may revisit the *prima facie* case after a trial on the merits. As discussed *infra*, the Sixth Circuit Court of Appeals applied this Court's precedent in *Reeves* and *Hicks* correctly with respect to the review a court must give to a judgment as a matter of law following a verdict by a trier of fact. It must be noted that Noble strives mightily to ascribe sinister motives to the Sixth Circuit Court of Appeals; that is, he intimates that the reason the Sixth Circuit decided as it did was to deprive civil rights plaintiffs of jury verdicts. (Petition, at 20). Such a statement is wholly inappropriate and completely unsupported by the analysis of this case. As discussed below, the Sixth Circuit followed exactly this Court's directives.

This Court held in *United States Postal Service Board v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1982), that the ultimate factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. Thus, this Court stated, "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'" *Id.* at 715, 103 S.Ct. 1478, 75 L.Ed.2d 403, citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207. However, this Court also cautioned that "none of this means that trial courts or reviewing courts should treat discrimination differently from

other ultimate questions of fact." *Id.* at 716, 103 S.Ct. 1478, 75 L.Ed.2d 403.

In two subsequent cases, this Court refined the *Aikens* holding, allowing reviewing courts some consideration of the *prima facie* case, exactly as the Sixth Circuit did here. Eleven years after *Aikens*, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), this Court stated that "[it] is not enough, in other words, to *dis* believe the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." *Id.* at 519, 113 S.Ct. 2742, 125 L.Ed.2d 407.

In 2000, this Court decided *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) where it held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148, 120 S.Ct. 2097, 147 L.Ed.2d 105. Indeed, proof that the employer's explanation for its actions is not credible is "simply one form of circumstantial evidence that is probative of intentional discrimination." *Id.* at 147, 120 S.Ct. 2097, 147 L.Ed.2d 105. Even in the face of such a holding, however, this Court did not abrogate the holding in *Hicks* that mere disbelief of an employer's proffered reason is insufficient to support a finding of intentional discrimination, but rather there must also be a belief in the plaintiff's explanation.

In the face of such holdings as those of *Hicks* and *Reeves*, the Sixth Circuit correctly reversed the trial court's denial of judgment as a matter of law. Noble presented no evidence that a reasonable fact finder would believe evidenced any

discrimination at all. Thus, even if the fact finder did not believe Brinker's proffered reason for Noble's termination, such is not enough. The lack of affirmative evidence on the part of Noble that intentional discrimination played any part in his termination doomed his case.

All Noble has argued was that he fulfilled his *prima facie* case and thus, the trial court and the Sixth Circuit were precluded from examining it again. Such a claim, however, flies in the face of this Court's rulings in *Hicks* and *Reeves*. Indeed, the Sixth Circuit noted "that is not to say that the evidentiary underpinnings of a plaintiff's *prima facie* case are irrelevant or insulated from examination by this court to aid its determination whether the evidence in toto is sufficient to support a finding of intentional discrimination." Instead, the Sixth Circuit correctly invoked this Court's holding in *Hicks*: the jury must believe the reason offered by the plaintiff, that is, it must believe that the plaintiff was the victim of intentional discrimination. It also correctly noted that this Court in *Reeves* had examined each element of the *prima facie* case, which refutes Noble's claim that after a jury trial it must never be examined again.[3] Significantly, this Court actually criticized the Fifth Circuit Court of Appeals for ignoring the evidence of the plaintiff's *prima facie* case, which presumably would be the same outcome here.

To accept Noble's view would require this Court to abrogate its holdings in *Hicks* and *Reeves* and Noble has

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[3] Indeed, in *Reeves*, a jury verdict in favor of a plaintiff was revived by this Court, with this Court finding error on the part of the Fifth Circuit Court of Appeals when it failed to look at evidence supporting the plaintiff's *prima facie* case. *Reeves*, 530 U.S. at 139, 120 S.Ct. 2097, 147 L.Ed.2d 105. Surely, Noble does not argue that this is an incorrect outcome.

proffered no legally sound reason for it to do so.[4] These cases stand for the proposition that judgment as a matter of law is inappropriate if its only basis is the failure of the plaintiff to prove the *prima facie* case; they do not stand for the proposition that the evidence supporting the *prima facie* case may never be revisited after a jury verdict. Indeed, the Sixth Circuit stated that "[this Court's] criticism of the Fifth Circuit in *Reeves* demands as much."

Some of the case law that Noble proffers in support of his claim actually allows the Sixth Circuit to do what it did and indeed, some of his citations are misleading. *See, e.g.*, *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 827 (6th Cir. 2000) ("Of course, evidence that bears upon elements of the *prima facie* case can also come into play in assessing the ultimate question of discrimination."); *Gatch v. Milacron, Inc.*, 111 Fed.Appx. 785 (6th Cir. Aug. 31, 2004) (reversing denial of judgment as matter of law because of failure to demonstrate evidence supporting *prima facie* case and that employer's proffered reasons were pretextual). *See also West v. Nabors Drilling USA*, Inc., 330 F.3d 379, 385 (5th Cir. 2003) (allowing disbelief of defendant's reason coupled with elements of *prima facie* case to suffice to show intentional discrimination); *Rubenstein v. Administrators of Tulane Educ. Fund.*, 218 F.3d 392 (5th Cir. 2000) (noting that under *Reeves*, a court adjudicating a motion for judgment as a matter of law should examine all of the evidence in the record); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 224 fn. 5 (5th Cir. 2000) (citing *Aikens* for proposition that

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[4] Some of the circuit case law that Noble proffers is of limited utility because it predates this Court's holding in *Reeves* or *Reeves* was not mentioned in the opinion. *See, e.g, EEOC v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997).

prima facie case is irrelevant, but noting that entire record must be reviewed); *McNulty v. Citadel Broadcasting Co.*, 58 Fed.Appx. 556 (3d Cir. Feb. 26, 2003) ("our inquiry into the sufficiency of the evidence does not differ markedly from inquiring into whether McNulty has submitted evidence sufficient to establish the elements of a *prima facie* case and then sustained his burden of proving that Citadel's reasons were a mere pretext"); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639 (4th Cir. 2002) (noting that *Reeves* instructs that factors including the strength of the plaintiff's *prima facie* case may be considered on a motion for judgment as a matter of law); *Pandya v. Edward Hosp.*, 1 Fed.Appx. 543 (7th Cir. Jan. 17, 2001) (citing *Reeves* standard).

Interestingly, the case of which Noble speaks so glowingly as an "excellent example of the correct implementation of *Reeves*" -- *Barnes v. City of Cincinnati* -- actually states that the "evidentiary underpinnings of a plaintiff's *prima facie* case are not irrelevant or insulated from our examination to aid our determination whether the evidence is sufficient to support a finding of intentional discrimination." 401 F.3d 729 (6th Cir. 2005) (emphasis added). That is the correct interpretation of *Reeves*. In a testament to the correctness of the Sixth Circuit's decision in this case, the *Barnes* court (of which Noble apparently approves) actually cites *Noble* for this proposition!

Acknowledging that a plaintiff may introduce additional evidence of discrimination, the Sixth Circuit undertook an exhaustive examination of all the evidence in this case to determine if Noble had carried his burden of proof with respect to the "ultimate question of discrimination." In so doing, the Sixth Circuit examined what is obviously the best indicator of disparate treatment with respect to race – the treatment of a similarly situated white employee who engaged

in the same behavior. To this end, it examined the comparables that Noble himself had proffered – a white employee named Michael Brahler and an employee named "Will" who was of undetermined race.[5]

Brahler, a white male, worked under Ficorelli at the Worthington Macaroni Grill and was alleged by Noble to have failed to show or call off for a shift, but was not terminated. Noble argued below that the evidence showed that Brahler failed to appear for over one week, but was not terminated until missing a full week of work. Because, Noble claimed, he had been terminated after missing only one shift, this was evidence that he had been treated differently because of his race. Unfortunately for Noble, however, he incorrectly attributed importance to this event. On the first occasion, Brahler's car broke down and he did call in, being told when he called not to bother to come in because business was slow. This is of course a distinct difference from Noble's situation – Brahler did not violate the no call/no show rule while Noble did. On the second occasion, Brahler put in his two week resignation notice and then stopped coming to work, failing to ever appear again. Had he appeared again, the unrefuted evidence would have been that he would not have been allowed to work, just as Noble was not allowed to return to work. As Brahler apparently found greener pastures elsewhere, this situation never came to pass, and it was speculation on Noble's part that somehow Brahler was treated more favorably.

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[5] At Page 24 of his Petition, Noble claims that he proved the fourth prong of the *prima facie* case, which is surprising because of his strenuous objection that the *prima facie* case means nothing after a jury verdict.

With respect to the alleged employee named "Will" the only evidence presented was that there was a notation in the manager's book that Will no longer worked for Macaroni Grill because he had not appeared for a shift in over a week. That was it. There was no evidence presented as to who Will was, the position he held, the circumstances behind his non-appearance, his last name, or even whether Will was white! The complete lack of evidence on this proffered comparable fatally damaged Noble's claim that this somehow demonstrated disparate treatment.

The final piece of evidence that Noble proffered was the testimony of a Macaroni Grill assistant manager who testified that in his experience an employee would not be terminated for the first violation of the no call/no show policy. This is irrelevant in the absence of any evidence that this policy was applied discriminatorily to Noble or more favorably to white employees.

The Sixth Circuit concluded:

> Our conclusion that Noble failed to produce evidence at trial to support a *prima facie* case of discrimination is significant because it takes Noble outside the scope of the rule applied in *Reeves*. As noted above, that case held that evidence supporting a plaintiff's *prima facie* case, together with sufficient evidence to permit the jury to conclude 'that the employer's asserted justification is false,' may permit a factfinder to find for the plaintiff. That holding is inapplicable to the facts of this case because Noble failed to present evidence to support a *prima facie* case. Furthermore, even if we were to assume the existence of a *prima facie* case within the meaning of *Reeves*, that case would not mandate affirmance as Nobel contends.

> The *Reeves* Court was careful to make clear that there is no magic formula that will always guarantee victory to a party in an employment discrimination case. Instead, a discrimination case is subject to Rule 50 review in the same manner as any other case. The Court clearly stated that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false" will not "*always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the evidence was discriminatory." (Internal citations omitted).

III. THE SIXTH CIRCUIT DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE JURY.

It is undisputed that a court considering a motion for judgment as a matter of law must not make any credibility determinations.[6] Here, however, Noble asks this Court to do so.

With respect to the lack of evidence of any causal nexus between Lawrence and Ficorelli, this has been exhaustively discussed, *supra*. Here, the Sixth Circuit did not engage in any credibility analysis, but simply took their unrefuted

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[6] Noble appears to intimate that jury verdicts are absolutely immune from reversal. (Petition, at 26, stating that the "tendency of some circuit courts to grant Rule 50 motions for judgment as a matter of law after *Reeves* is disturbing"). This is of course, not so, as discrimination actions are no different from other civil actions, the very types of actions Rule 50 was promulgated to address.

testimony at its face. The only "evidence" Noble proffered to refute it was his own opinion that basically claimed "they must have" discussed him and such discussion "must have" influenced the decision to terminate him. In so doing, Noble seeks to have the Sixth Circuit or this Court elevate his inadmissible opinion as more credible than the testimony of the two participants in the conversation. He goes on to point out that Lawrence and Ficorelli were "impeached" at trial; this is a credibility issue, of course, and was not something that the Sixth Circuit did consider, or could have considered. In fact, Noble's discussion throughout Pages 28 and 29 is replete with statements about credibility determinations, which is what Noble seeks to have excluded. He cannot, of course, have it both ways.

CONCLUSION

In conclusion, Noble has provided this Court with no basis on which it can or should accept certiorari. The Sixth Circuit applied this Court's precedents in *Hicks* and *Reeves* correctly, analyzed all of the evidence with respect to Brinker's motion for judgment as a matter of law correctly, and did not engage in a credibility determination. Accordingly, Noble's Petition for a Writ of Certiorari must be DENIED.

Respectfully submitted,

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